These are the tentative rulings for civil law and motion matters set for Tuesday, September 16, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, September 15, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. M-CV-0061892 Pinnacle Opid LLC vs. Skinner, Avery K., et al

Appearance required on September 16, 2014 at 8:30 a.m. in Department 40.

2. M-CV-0062037 Shadowbrook Apartments LLC vs. Hines, Gayle

Defendant's Motion to Quash Service of Summons is denied without prejudice.

There is no proof of service in the court's file showing that defendant's motion was served on plaintiff. In addition, the motion is premature as plaintiff has not yet filed a proof of service of summons in this action.

3. S-CV-0027179 Volen, Bart vs. CSCG, Inc., et al

The Motion to Enforce Settlement Agreement is dropped. No moving papers were filed.

4. S-CV-0027875 Trujillo, Rudy, et al vs. Tri City Storage LLC, et al

This tentative ruling is issued by the Honorable James D. Garbolino. If oral argument is requested it shall be heard on September 16, 2014 at 8:30 a.m. in Department 4, located at 101 Maple Street, Auburn, CA.

Plaintiffs' Motion for Attorneys' Fees

Plaintiffs move for an award of attorney fees as the prevailing party, pursuant to California Labor Code §§ 226, 1194, and 1194.5, and California Welf. & Inst. Code § 15657.5. Plaintiffs' request amounts to $1,381.258.30. That amount is based upon 1306.5 regular hours calculated at $495 per hour, 87.8 post-judgment hours, calculated at $495 per hour, and 55.2 hours travel time calculated at $247.50. These requests total $703,840.50 Counsel seeks a 2.0 multiplier for pre-judgment hours and travel time, and 1.3 for post judgment hours.

Time Category	Total	Multiplier	Total
1. Regular Time	648,717.50	2.0	1,297,435.00
2. Post Judgment/Fee Motion	43,461.00	1.3	56,499.30
3. Travel Time	13,662.00	2.0	27,324.00
Total Fees Claimed			**1,381,258.30**

Defendants assert that the certainty of payment should act as a reducing factor, given that the judgment herein, including interest, amounted to $277,522.53, and was paid within three weeks of the final entry of judgment. Defendants further argue that evidence of settlement discussions is not relevant to the issue of attorney fees, that Plaintiffs' post-trial proffer of a document previously ruled privileged should reduce the fee award as a sanction, and that items attributable to the defense of the defendants' case against Colleen Trujillo should be deducted as well. The defendants do not object to the Plaintiffs' claim based upon $495 per hour as a reasonable hourly rate.

Number of hours. Defendants claim 22 instances of inefficiency or exaggerated billing, mostly in the opinion of defense counsel. With certain exceptions relating to the defendants' cross-complaint, the court finds the objections unpersuasive. The litigation posture of this case was apparent from the beginning: the case would be vigorously defended by experienced and capable counsel. Counsel for Plaintiffs was faced with difficult legal concepts and factual scenarios. In hindsight, it is apparent that this case would likely only resolve by trial. The amount of preparation and the Plaintiffs' focus on precision in pleadings and factual development was consistent with the difficulty of the case.

Defense of the Cross-Complaint. Plaintiffs may not recover for attorney time in defending against the cross-complaint. *See Akins v. Enterprise Rent–A–Car Co. of San Francisco* (2000) 79 Cal.App.4th 1127, 1133–1134. Although the cross-complaint had a potential impact on Plaintiffs' case, it was a separate and divisible matter, and stood on its own regardless of the outcome of Plaintiffs' case-in-chief. While the defense would reduce the total hours by 35%, the court estimates that the total time attributable to the defense of the cross-complaint represents 15% of the total time expended on the case in the "regular hours" category. The court has similarly reduced the travel time. This results in a reduction in the requested hours to 1,110.53.

A moderate multiplier is appropriate in this case, based upon the contingency factor, and the required skill level required to litigate. Plaintiffs ultimately achieved success in both litigating their own claims, and defending against the cross-complaint. The court has selected a multiplier of 1.4 for the pretrial hours, and 1.1 for post-judgment hours. The court does not select a multiplier to increase the travel time in this matter, because the trial court in Auburn was 34 miles from counsel's office, and less than 20 miles from the Roseville courthouse. Granted, there was necessary travel to other locations for depositions and other trial-related matters, but given the fact that travel to Placer County, which this court considers to be well within the immediate area of counsel's office, may be fairly argued to be part of the Plaintiffs' overhead, the amount awarded seems appropriate under the circumstances of this case.

The court finds that a reduction should not occur because of the inadvertent inclusion of privileged material in Plaintiff's moving papers. This resulted in no prejudice to the defense since the court was already aware of the document, and previously ruled on its inadmissibility. By this order, the court orders the document removed from the Plaintiffs' moving papers herein, and sealed in a confidential envelope. A page shall be inserted into Plaintiffs' moving papers noting the removal of the document and placement in a separate confidential envelope in the file.

The court has calculated the fees as follows:

Time Category	**Requested**	**Granted**	**Lodestar**	**Multiplier**	**Total**
Regular	1306.50	1110.53	549,709.88	1.4	769,593.83
Post-judgment	87.80	87.80	43,461.00	1.1	47,807.10
Travel	55.20	46.92	11,612.70	1.0	11,612.70
Totals	**1449.50**	**1245.25**			**829,013.63**

Plaintiffs are awarded attorneys' fees in the total amount of **$829,013.63** from defendants.

Plaintiffs' Motion for Costs and Fees Pursuant to C.C.P. § 2033.420

Plaintiffs' Motion for Costs and Fees Pursuant to C.C.P. § 2033.420 is granted in part.

Plaintiffs request costs totaling $95,826.18 pursuant to Code of Civil Procedure section 2033.420. Of this total, $65,741.38 in costs is set forth in Plaintiffs' memorandum of costs filed on June 25, 2014. In addition to this amount, Plaintiffs seek costs of $30,084.80, relating to expenses that were not listed in Plaintiffs' memorandum of costs.

Section 2033.420 provides that if a party fails to admit the truth of any matter when requested to do so, and the party seeking the admission later proves the truth of that matter, the party seeking the admission may move the court for an order requiring responding party to pay the reasonable expenses incurred in proving the matter. Code Civ. Proc. § 2033.420(a). Plaintiffs served requests for admission relating to Plaintiffs' employment status and non-exempt

status, and Defendants' nonpayment of minimum and overtime wages, failure to furnish itemized wage statements, and liability for waiting time penalties, all of which were denied. These matters were subsequently proven at trial. Plaintiffs argue that Defendants had no reasonable basis to deny the subject requests for admission.

In response to Plaintiffs' motion, Defendants essentially concede that they had no reasonable basis to deny the requests for admission. However, Defendants assert that five expense items totaling $30,084.80, which were not set forth in Plaintiffs' memorandum of costs, do not constitute expenses incurred in making the proof of issues that were denied, and are not allowable costs under CCP § 1033.5. In response, Plaintiffs generally state that each of the five items objected to by Defendants was necessary to prove at least one aspect of the several requests for admission that were denied. However, Plaintiffs provide no specific information to establish that the subject expenses were necessarily incurred to prove the matters set forth in the requests for admission.

Plaintiffs have failed to establish that the expenses objected to by Defendants were reasonably incurred in proving the matters denied in the requests for admission. While some expert testimony may have related to the wage and hours claims alleged by Plaintiffs, the expert testimony would have been required to calculate Plaintiffs' damages even if Defendants had admitted to minimum wage and/or overtime violations. Other items claimed by Plaintiffs appear to relate to only Defendants' cross-claims against Colleen Trujillo for embezzlement and conversion.

Defendants raise no objection to expenses of $65,741.38, which are also set forth in Plaintiffs' memorandum of costs. Pursuant to Code of Civil Procedure section 2033.420, Plaintiffs are awarded expenses in the amount of **$65,741.38.**

Defendants' Motion to Tax Costs

Defendant's Motion to Tax Costs is denied as moot in light of the court's ruling on plaintiffs' Motion for Costs and Fees Pursuant to C.C.P.§ 2033.420.

5. S-CV-0029335 Venue at Galleria Homeowners Assoc. vs. Villas at Galleria

Steadfast Insurance Company on behalf of Falcon Enterprises, Inc. dba Falcon Roofing Company's Motion for Determination of Good Faith Settlement is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling tortfeasor's proportionate share of liability for plaintiff's injuries, and therefore is in good faith within the meaning of Code of Civil Procedure section 877.6.

If oral argument is requested, moving party's request for telephonic appearance is granted. All telephonic appearances are governed by Local Rule 20.8.

6. S-CV-0030541 Nersesyan, Svetlana vs. Bank of America, N.A.

The Motion for Relief From Default is continued to October 7, 2014 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

7. S-CV-0031201 Remy, David et al vs. Sampson, Theodore et al

Plaintiffs' Motion to Set Aside Dismissal of Complaint is denied.

The motion was not served on all parties to the action, and was served with insufficient notice time. Code of Civil Procedure section 473(b) requires that an application for relief from a judgment, dismissal, order or other proceeding taken against a party must be made no later than six months after the judgment, dismissal, order or proceeding was taken. In this case, the application was filed more than a year after entry of the dismissal entered on June 4, 2013. Some cases have found that a judgment may be set aside at any time on the grounds of extrinsic fraud or mistake. *Olivera v. Grace* (1942) 19 Cal.2d 570, 576; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300; *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290–291. However, plaintiffs offer no authority for the court's ability to set aside a knowing acquiescence in dismissal by the court by plaintiffs based on a subsequent change of circumstances.

8. S-CV-0031387 Cope, Foster Bud, et al vs. William L. Lyon & Assoc., et al

Defendant William L. Lyon & Associates, Inc. dba Lyon Real Estate's ("Lyon's") Motion for Attorneys' Fees to be Included in Judgment was previously set for hearing on September 2, 2014. Following oral argument, the court continued the motion to permit further briefing by Lyon. After consideration of Lyon's supplemental briefing, the court rules as follows:

Lyon's Motion for Attorneys' Fees to be Included in Judgment is denied.

This action was initiated by twelve real estate investors for breach of contract, breach of fiduciary duty, fraud, and other related claims arising out of a plan to purchase and develop real property in Placerville, California. Plaintiffs alleged that two individual defendants with whom they invested their money were acting as agents for Lyon with respect to the acts alleged in the complaint. The court ultimately granted summary judgment in favor of Lyon on the grounds that plaintiffs had no evidence to support their contention that the individual defendants were acting as agents of Lyon. Lyon now seeks attorneys' fees pursuant to a provision in the Operating Agreement for Broadway Heights, LLC, the entity in which the plaintiffs had invested.

The Operating Agreement contains the following provision:

> Any action to enforce or interpret this Agreement or to resolve disputes between the Members or by or against any Member shall be settled by arbitration ... Arbitration shall be the exclusive dispute resolution process in the State of California, ... The prevailing party shall be entitled to reimbursement of attorney fees, costs, and expenses incurred in connection with the arbitration; including but

not limited to enforcement of this arbitration clause and enforcement of any judgment issued pursuant to any arbitration.

The traditional "American rule" is that each party to a litigation must bear his own fees. *Trope v. Katz* (1995) 11 Cal.4th 274, 278-279. Attorneys' fees are generally not recoverable as costs unless authorized by statute or agreement. *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127. Further, a contract must be enforced according to its terms. The court is not permitted to expand an attorneys' fees agreement to cover situations not specified by the parties in the agreement. *Kalai v. Gray* (2003) 109 Cal.App.4th 768, 777.

In *Kalai*, the appellate court examined an attorneys' fees provision similar to the provision at issue in this case. The plaintiff filed his action with the trial court, and defendant prevailed on summary judgment based on the argument that the parties had agreed to submit the subject claims to arbitration. Defendant sought attorneys' fees based on a provision granting the prevailing party "to such Arbitration proceedings" "all reasonable attorney's fees and costs incurred ... in connection with the Arbitration proceedings." *Kalai v. Gray, supra,* 109 Cal.App.4th at 771. The court found that the prevailing defendant was not entitled to attorneys' fees under the express language of the contract, because he was not the prevailing party in an arbitration. The court expressly did not address the question of whether the agreement could be interpreted to cover fees incurred in court litigation if defendant had acquiesced in plaintiff's desire to litigate the dispute. *Id.* at 778.

In this case, the attorneys' fees likewise provision provides that a prevailing party is only entitled to attorney's fees where the matter is submitted to arbitration. However, the parties in this action did not attempt to arbitrate the claims at issue, instead proceeding with litigation. Thus the court is presented with the question which the *Kalai* court identified but did not rule on, whether the agreement could be interpreted to cover fees incurred in court litigation given Lyon's acquiescence to plaintiff's desire to litigate the dispute.

The court finds that the agreement must be interpreted according to its plain language. There is nothing in the Operating Agreement providing for attorney's fees to a prevailing party who litigates claims arising from the Operating Agreement in court. The agreement expressly limits fees to the prevailing party in an arbitration, and there has been no arbitration. "A valid ... contract must be enforced according to its terms." *Kalai v. Gray, supra,* 109 Cal.App.4th at 777. Adopting the interpretation urged by Lyon would require the court to rewrite the operative agreement absent any compelling evidence that the parties to the agreement intended it to be interpreted in a manner that contradicts its terms.

Lyon argues that it is entitled to attorneys' fees pursuant to Civil Code section 1717, in that plaintiffs took the position that Lyon was liable for attorneys' fees pursuant to the Operating Agreement, and Lyon would have been liable for such fees if plaintiffs had prevailed on this argument. However, the mere assertion of contractual entitlement to fees does not automatically trigger application of Civil Code section 1717. Rather, the statute provides a reciprocal remedy for a nonsignatory defendant "when a plaintiff *would clearly be entitled to attorney's fees* should he prevail in enforcing the contractual obligation against the defendant." *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (emph. add.) "Merely praying for relief to which one is not

entitled cannot ordinarily engender either reliance or detriment." *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 898 (rejecting view that estoppel provides basis for awarding attorney fees); see also Hasler v. Howard (2005) 130 Cal.App.4th 1168, 1171. In this case, plaintiffs would not clearly have been entitled to attorneys' fees against Lyon even if they had prevailed in this action, because the provision at issue limits awardable attorneys' fees to those incurred in connection with arbitration, which did not occur.

A contract must be interpreted, if possible, to give effect to all of its provisions. Civ. Code § 1641. In this case, the parties to the Operating Agreement agreed to submit their claims to binding arbitration, and that within the arbitration context, the prevailing party would be entitled to his or her attorneys' fees. The language is not ambiguous, and there is no basis for the court to expand the provision beyond its plain meaning. That plaintiffs' prayed for attorneys' fees in this action does not, without more, constitute persuasive evidence supporting a contrary interpretation. Pursuant to the limiting language of the attorneys' fees provision at issue, Lyon is not contractually entitled to attorneys' fees as the prevailing party in this action.

On a final note, Lyon filed a memorandum of costs requesting other costs in the amount of $3,854, and repeats its request for costs in this motion. As plaintiffs failed to timely challenge Lyon's cost bill, they waived any objections thereto. *Douglas v. Willis* (1994) 27 Cal.App.4th 287, 290. Accordingly, Lyon is awarded costs from plaintiffs in the total amount sought, $3,854.

9. S-CV-0033369 Mullican, John, et al vs. Ford Motor Company

The Motion to Compel Vehicle Inspection was dropped by the moving party.

10. S-CV-0033566 Thornton, Robert, et al vs. East West Partners, Inc., et al

The Motion to Certify Class Action is continued to October 9, 2014 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

11. S-CV-0034021 Bakotich, Dean vs. Cehan, E. Gregory, M.D.

Plaintiff's Motion to Vacate Dismissal is denied.

Pursuant to Code of Civil Procedure section 473(b), a party may seek relief from a judgment, dismissal, order or other proceeding taken against him on the grounds of mistake, inadvertence, surprise or excusable neglect. While plaintiff asserts that he is moving under each of these four grounds, the application appears to actually be based only on excusable neglect, in that plaintiff believed an unnamed "legal assistant" would deal with the court's notice that it intended to dismiss the action.

The burden is on the moving party to show a reasonable excuse for the dismissal, i.e., that the dismissal could not have been avoided through the exercise of ordinary care. *See Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58. Plaintiff, who filed the action *in pro per*, asserts that after receiving the court's notice setting an Order to Show Cause re Dismissal, he spoke with his "legal assistant" and believed that she would take care of it. However this person later

moved to Las Vegas and could not be reached. Plaintiff fails to demonstrate that he reasonably relied on the representations of this individual, or that he was otherwise prevented from appearing at the hearing of which he admits he had notice, which required an appearance and at which a non-attorney could not have appeared for plaintiff in any event. As plaintiff has failed to satisfy his burden of demonstrating a reasonable excuse for the dismissal, the motion is denied.

12. S-CV-0034231 Adams, Steven, et al vs. Flagstar Bank, FSB, et al

Defendant RoundPoint Mortgage Servicing Corporation's ("RoundPoint's") request for judicial notice is granted.

RoundPoint's Demurrer to Complaint is sustained with leave in part, and without leave in part, as set forth below.

RoundPoint's Demurrer is sustained without leave to amend as to plaintiffs' first cause of action for violation of Civil Code section 2923.5, second cause of action for violation of Civil Code section 2923.55, third cause of action for violation of Civil Code section 2923.6(c), and fourth cause of action for violation of Civil Code section 2923.6(f). The first, second and third causes of action are moot as based on documents of which the court takes judicial notice, the operative notice of default has been rescinded. With respect to the fourth cause of action for violation of Civil Code section 2923.6(f), plaintiffs fail to adequately allege prejudice or harm, as they admit that they have submitted a subsequent loan modification application which has been accepted for review. As it does not appear that these claims can be amended to state valid claims, the demurrer is sustained without leave to amend as to the first, second, third and fourth causes of action.

RoundPoint's Demurrer is sustained with leave to amend as to plaintiffs' fifth cause of action for violation of Civil Code section 2923.7, sixth cause of action for violation of Civil Code section 2924.10, and seventh cause of action for promissory estoppel. Civil Code section 2923.7 requires that plaintiffs first request a single point of contact to establish a violation, which plaintiffs fail to allege. Although plaintiffs adequately allege that they did not receive written acknowledgement of receipt of their most recent loan modification application for purposes of Civil Code section 2924.10, they fail to adequately allege prejudice or harm. The complaint states only that "Plaintiffs continue to be harmed in being forced to defend against the foreclosure actions commenced by Defendants." (Complaint, ¶ 107.) However, the court need not accept this allegation as true in light of the notice of rescission of the notice of default that has been recorded, of which the court takes judicial notice.

Finally, the seventh cause of action for promissory estoppel fails to state a valid claim as plaintiffs fail to allege a promise that was clear and unambiguous on its face, and fail to allege detrimental reliance or damages. Plaintiffs allege that defendants made representations "regarding their ability and/or desire to assist [plaintiffs] in obtaining a loan modification", and that if plaintiffs submitted a complete application they would be "considered for a loan modification and that no foreclosure actions would proceed until a decision was arrived at..." (Complaint, ¶¶ 110, 111.) Based on documents of which the court takes judicial notice,

defendants are not proceeding with any foreclosure actions as the notice of default has been rescinded.

Any amended complaint must be filed and served by no later than October 3, 2014.

13. S-CV-0034255 Heard, William vs. Ford Motor Company

The hearing regarding appointment of discovery referee is dropped at the request of the parties.

14. S-CV-0034623 Atherton, David, et al vs. JP Morgan Chase Bank, N.A., et al

The Demurrer to the Complaint is dropped as moot. A first amended complaint has been filed.

15. S-CV-0034799 Miller, Chris, et al vs. NR Homes, Inc., et al

Defendants' Demurrer to Plaintiffs' Complaint is overruled in part, and sustained in part, with leave to amend.

As a preliminary matter, the demurrer is procedurally deficient. Where there are several grounds for demurrer, each must be stated in a separate paragraph and must state whether the challenge is to the entire pleading or to some specific cause of action therein. Cal. R. Ct., rule 3.1320(a). Where several grounds are stated conjunctively in the same paragraph, the demurrer violates the applicable rule of court. As plaintiffs raise no objections, and there does not appear to be any resulting prejudice, the court will excuse the defect for purposes of ruling on the demurrer.

The demurrer is overruled with respect to plaintiffs' third cause of action for unfair business practices and fourth cause of action for declaratory relief. The complaint alleges sufficient facts to support these causes of action.

The demurrer is sustained with leave to amend with respect to plaintiffs' first cause of action for misappropriation of trade secrets. The complaint fails to adequately allege that the trade secrets were disclosed to the defendant under circumstances giving rise to a contractual or other legally imposed obligation on the part of the disclose not to use or disclose the secret to the detriment of the discloser. *Diodes v. Franzen* (1968) 260 Cal.App.2d 244, 250.

The demurrer is sustained with leave to amend with respect to plaintiffs' second cause of action for intentional interference with contractual relations. The complaint fails to adequately allege that defendant had knowledge of the contracts, and that an actual breach of disruption of the contractual relationship occurred as a result of defendant's wrongful interference.

Finally, the demurrer is sustained with leave to amend with respect to plaintiffs' fifth cause of action for libel. Due to the fact that the complaint incorporates by reference an incorrect

paragraph number, the complaint fails to adequately allege publication of false or unprivileged statements of fact.

Any amended complaint must be filed and served by no later than October 3, 2014.

In light of the ruling on the demurrer, defendants' Motion to Strike Portions of Plaintiffs' Complaint is dropped as moot.

16. S-CV-0034839 Suede Blue, Inc. v. Watt, James Kin Sing et al

The Demurrer to Complaint is continued to October 7, 2014 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

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